

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of)	
)	
Protecting the Privacy of Customers of Broadband)	WC Docket No. 16-106
and Other Telecommunications Services)	

REPLY COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS

The Association of National Advertisers (ANA),¹ on behalf of its members, files Reply Comments in the Federal Communications Commission’s (the Commission’s) Notice of Proposed Rulemaking (NPRM) seeking to expand the Customer Proprietary Network Information (CPNI) rules to broadband Internet access service (BIAS).

A careful examination of the record in this proceeding continues to demonstrate that the proposed rules:

- Fail to promote the public interest;
- Radically diverge from longstanding national and international privacy principles by failing to distinguish adequately between sensitive and non-sensitive data;
- Threaten to severely burden consumers, business, and the U.S. economy by creating a barrage of opt-in notices and data breach alerts that will create significant “notice fatigue,” seriously eroding privacy and data security interests;

¹ Founded in 1910, ANA’s membership includes more than 700 companies with 10,000 brands that collectively spend over \$250 billion in marketing and advertising. ANA provides leadership for small businesses and household brands that advances marketing excellence and shapes the future of the industry. ANA includes the Business Marketing Association (BMA) and the Brand Activation Association (BAA), which operate as divisions of the ANA, and the Advertising Educational Foundation, which is an ANA subsidiary. The ANA is also a founding member of the Digital Advertising Alliance (DAA) Self-Regulatory Program. The DAA establishes and enforces responsible privacy practices across the industry for relevant digital advertising, ANA promotes the interests of marketers and protects the First Amendment rights and well-being of the marketing community.

- Undermine the ability of advertisers to effectively reach consumers with information that is relevant to their interests in an economically efficient manner, thereby harming consumers and imposing significant economic costs;
- Impose rigid and unreasonably rapid data breach notice requirements that ignore the realities of breach incident investigation and law enforcement needs while placing major unnecessary costs on consumers and businesses alike;
- Ignore the existing effective privacy self-regulatory efforts (strongly buttressed by Federal Trade Commission (FTC) and state enforcement) and laws protecting highly sensitive personally identifiable health, financial, and children's data which obviate the need for the rigid and constitutionally overbroad restrictions on BIAS providers; and
- Place substantial undue burdens on speech violating the First Amendment.

I. THE RECORD FAILS TO DEMONSTRATE THAT THE PROPOSED RULES WOULD SERVE THE PUBLIC INTEREST.

As demonstrated in ANA's initial filing and further amplified by numerous other groups in the voluminous record in this proceeding, the Commission's proposed privacy rules represent a dramatic and counterproductive expansion of its jurisdiction over privacy matters that would severely harm consumers. ANA noted in its initial comments that the proposed rules, if adopted, would result in the following specific adverse effects.

Harm to Advertisers and Advertising Interests. ANA reiterates its previously expressed concern that the NPRM's mandatory opt-in consent requirement for most interest-based online advertising facilitated by BIAS providers would dramatically curtail the effectiveness of online advertising, as well as reduce advertising's significant contributions to consumers and the availability of free or reduced cost content on the Internet. Because BIAS providers are major advertisers in the interest-based advertising market, the NPRM could place them at a significant disadvantage. Various commenters agreed with ANA that the NPRM would result in widespread

content and revenue loss and less effective and relevant advertising to the public,² and would raise the possibility of increasing the potential for some providers to raise subscription rates due to lost advertising revenue.³ ANA also made clear that the proposal hurts a far broader range of advertisers.⁴

Increased Costs for Consumers. ANA strongly agrees with the findings of Joshua Wright, a former FTC Commissioner, that “[t]he privacy interests of consumers are not advanced by the FCC’s proposal....the NPRM establishes a regime that would ultimately inflict significant consumer welfare losses, in the form of higher prices for broadband and other services offered by ISPs [Internet Service Providers], a greater rate of irrelevant and inefficient advertising, and reduced innovation and experimentation in the online ecosystem.”⁵ In addition, George Washington University School of Business Professor Howard Beales noted that “[t]here is substantial evidence that interest-based advertising increases advertising efficiency.” One study, for example, found that “advertising availabilities associated with a new cookie (30 days old) sold for roughly three times the price that won the auction if there was no cookie...[and] [f]or an ad with a 90 day cookie, the price was 3.7 to 7.1 times higher than with no cookie.”⁶ Such advertising revenue is highly important, Beales noted, “to support a wide range of content, applications and services for consumers.”⁷

² See e.g., Comments of Verizon, at p. 13; see also Comments of the National Cable and Telecommunications Association, at p. 56.

³ See e.g., Comments of AT&T Services, Inc., at pp. 53-55.

⁴ For example, ANA noted that traditional website publishers and bloggers, many of whom are already moving behind paywalls or facing continued threats from ad blocking, would be further undermined by the NPRM’s proposals.

⁵ “An Economic Analysis of the FCC’s Proposed Regulation of Broadband Privacy,” by Joshua D. Wright (submitted in an ex parte comment by US Telecom, May 27, 2016), at p. 3.

⁶ Comments of George Washington University School of Business, <https://ecfsapi.fcc.gov/file/60002077356.pdf>, at p. 9.

⁷ *Id.* at 10.

AT&T Services, Inc., echoed deep concern about these potential harms, stating “the proposed rules would be affirmatively harmful to consumers, not just unnecessary to protect them. By making it far more difficult for ISPs to do what the rest of the Internet has long done — use non-sensitive customer data to engage in socially productive first- and third-party marketing — the rules would reduce the profitability of broadband services, exert upward pressure on broadband prices, and depress incentives for broadband deployment.”⁸

Burdening the Majority of Consumers Who Prefer Interest-Based Advertising. As ANA has stressed on this record, consumers overwhelmingly prefer interest-based advertising over ads unrelated to their interests.⁹ It is obvious that consumers rightfully do not want to be inundated by advertising that is irrelevant to their interests or present needs.

In addition, FTC Commissioner Maureen Ohlhausen expressed in her comments that the proposed process of frequently obtaining affirmative consent would be burdensome for consumers, as “reading a notice and making a decision takes time that, in the aggregate, can be quite substantial.”¹⁰ ANA agrees with Commissioner Ohlhausen’s comments that “opt-in or opt-out defaults should match typical consumer preferences, which means they impose the time and effort of making an active decision on those who value the choice most highly.”¹¹ Other commenters noted that the proposed rules would result in constant, intrusive solicitations for opt-in consent, which in turn will result in consumer notice fatigue.¹² As ANA’s previous comment stated,

⁸ Comments of AT&T Services, Inc., at p. 4.

⁹ See Comments of the Association of National Advertisers, p. 6; *see also* Katy Bachman, *Poll: Targeted Advertising Is Not the Bogeyman*, Adweek (Apr. 18, 2013), www.adweek.com/news/technology/poll-targeted-advertising-not-bogeyman-updated-148649.

¹⁰ Statement of FTC Commissioner Maureen Ohlhausen Regarding Comment of the Staff of the Bureau of Consumer Protection, Federal Trade Commission, at p. 2.

¹¹ *Id.*

¹² *See e.g.*, Comments of WTA—Advocates for Rural Broadband, at p. 14; *see also* Comments of the American Cable Association, at p. 22.

customer notice fatigue has consequences. Consumers faced with a constant barrage of choice notifications on their computers, tablets and mobile phones may refuse to opt in altogether. This inaction would unintentionally result in consumers' favorite websites suffering service degradation from lost revenue. In other instances, consumers could find themselves aggravated by too many notices and therefore click to opt in, just to make an opt-in pop-up box go away. Therefore, notice fatigue is likely to undermine consumer focus on the privacy choice presented, whatever the sensitivity of the data involved.¹³

Creating a Regime That Departs From Consumer Expectations and Realities. ANA notes that the Progressive Policy Institute filed comments about its survey which found that 83 percent of consumers surveyed “agreed that online privacy should be protected based on the sensitivity of their online data, rather than on who is collecting and using the data.”¹⁴ Thomas Lenard and Scott Wallsten of the Technology Policy Institute also provide evidence refuting the Commission’s assertion that privacy concerns discourage consumers from adopting broadband data, noting that a survey found that “less than one-half of one percent of internet non-adopters report privacy concerns as the primary reason for not subscribing.”¹⁵

Accordingly, the record reflects that the proposed rules, if adopted, would not only fail to serve the public interest, but would in fact *harm* it by burdening consumers and businesses.

II. MANY COMMENTERS AGREE THAT THE COMMISSION’S HIGHLY DISRUPTIVE PROPOSAL FAILS TO DISTINGUISH BETWEEN SENSITIVE AND NON-SENSITIVE INFORMATION.

¹³ Comments of ANA, at p. 21.

¹⁴ Comments of Progressive Policy Institute, at p. 1.

¹⁵ Technology Policy Institute, An Economic Analysis of the FCC’s Privacy Notice of Proposed Rulemaking, <https://ecfsapi.fcc.gov/file/60002055729.pdf>, at p. 3.

ANA's statements about the potential extremely harmful effects of the NPRM's failure to distinguish between sensitive and non-sensitive information were echoed by many who filed comments.¹⁶ The NPRM would inevitably diminish access to vast amounts of non-sensitive data, which provides consumers with valuable information and enables all segments of the advertising community to develop ads relevant to consumer interests and, in turn, generates enormous economic activity in the U.S. Such a move would upend over a decade of privacy precedent carefully developed by the FTC, state governments, and self-regulatory organizations that distinguishes the treatment of sensitive and non-sensitive personally identifiable information. These developments would result in substantial consumer confusion in the Internet and mobile marketplace.¹⁷

Comments from the Staff of the FTC's Bureau of Consumer Protection in this proceeding delineate that agency's clear, long-held and appropriate distinction between sensitive and non-sensitive information, something which the NPRM fails to acknowledge. The FTC's comments state that consumer expectations depend on the sensitivity of the data at issue, and the FTC urges the Commission to "consider the FTC's longstanding approach, which calls for the level of choice to be tied to the sensitivity of data and the highly personalized nature of consumers' communications in determining the best way to protect consumers."¹⁸ The comments also observe

¹⁶ See e.g., Comments of the Future of Privacy Forum, at pp. 3-7; Comments of the Internet Commerce Coalition, at pp. 9-10; Comments of the American Cable Association, at pp. 51-52; Comments of the State Privacy and Security Coalition, at pp. 10-11; Comments of Comcast, at p. 16; Comments of the National Cable & Telecommunications Association, at pp. 59-86, 100; Comments of FTC Commissioner Maureen K. Ohlhausen, at pp. 2-3; Comments of Verizon, at p. 13; and Comments of AT&T Services, Inc., at pp. 75-78.

¹⁷ See e.g., Comments of ITTA that "the NPRM ventures far afield of all existing federal or state privacy and data security regimes," at p. 2; see also Comments of the George Washington University Regulatory Studies Center that "the Commission offers *no* evidence of *any* inadequacies in this privacy regime," at p. 2.

¹⁸ Comments of the Staff of the Bureau of Consumer Protection. Federal Trade Commission, at pp. 21, 23.

that this approach is consistent with existing international frameworks, which distinguish between sensitive and non-sensitive information.¹⁹

Consumers also do not expect (and therefore will not anticipate) that their information will be treated differently depending on the device they are utilizing at any given time. Yet the NPRM adopts an approach that will mandate substantially different privacy treatment depending on the method (i.e., phone, tablet, laptop, etc.) and type of on-line access consumers are utilizing to obtain information throughout the course of the day. This approach does not match consumers' expectations, and is not required to protect their privacy.

ANA continues to urge that regulatory requirements not be imposed on any non-sensitive data, and reiterates its concern that consumers' use of the online ecosystem will be seriously burdened by the NPRM's inappropriate homogeneous treatment of extremely disparate sweeping categories of information. Consumers need not be protected from the exposure of such details about their lives as their favorite color, desired flavor of ice cream or other such non-sensitive information. The Commission's regulatory resources should not be squandered – or onerous regulatory requirements be imposed – on data that is of no consequence to consumers, if released.

III. THE RECORD SHOWS THAT THE CURRENT SELF-REGULATORY SYSTEM IS WORKING AND FAILS TO DEMONSTRATE THAT AN ALTERNATIVE REGIME IS NECESSARY.

The proposed opt-in approval requirement is completely unnecessary and counterproductive because the current system is working well and fosters the public interest. Others concur with ANA that broad, effective privacy self-regulation, buttressed by FTC and state enforcement, provides strong protections to consumers and appropriate business interests.²⁰ The

¹⁹ *Id. at* p. 23 (n. 94.)

²⁰ *See e.g.*, Comments of the Direct Marketing Association, at p. 4.

comments of the Digital Advertising Alliance (DAA) Online Interest-Based Advertising Accountability Program (“Accountability Program”) illustrate the comprehensive nature of the existing privacy self-regulatory system, including its use of advanced technology to monitor member compliance and its thorough process for investigating suspected non-compliance.²¹ The comments demonstrate that the Accountability Program has successfully enforced privacy self-regulatory principles. Since its inception five years ago, the Accountability Program has answered approximately 15,000 consumer complaints and has opened sixty-six public enforcement actions.²²

The comments also note that FTC Bureau of Consumer Protection Director Jessica Rich has recognized the vital role of the Accountability Program in protecting consumers and helping to reduce regulatory oversight and enforcement, noting that “strong self-regulatory programs provide important guidance to industry, alleviate some of the FTC’s burden in monitoring for law violations, and develop workable standards that we all can draw on in future policy and enforcement efforts.”²³

Even the Electronic Frontier Foundation (one of the very few advocacy groups to mention self-regulation) praised the DAA’s self-regulatory principles, commenting that “[t]he Digital Advertising Alliance’s self-regulatory multi-site principles for online behavioral advertising appear consistent with” the Commission’s proposed definition of “personally identifiable information.”²⁴ While some others objected to the FTC’s structure, the solutions they proffered by no means match the Commission’s proposal. The Center for Democracy & Technology’s

²¹ Comments of the Accountability Program, <https://ecfsapi.fee.gov/file/60002078474.pdf>

²² *Id.* at p. 7.

²³ *Id.* at p. 8.

²⁴ Comments of Electronic Frontier Foundation, p. 5.

(CDT) preferred solution of adopting “simple, flexible baseline consumer privacy legislation” is completely at odds with the thrust of the NPRM, which proposes inflexible, complicated rules for BIAS providers and a bifurcated framework for the online ecosystem. Other comments lack convincing empirical evidence that the current system is not working. The existing sound regulatory structure clearly should not be replaced with the NPRM’s hastily developed and ill-considered proposed rules.

IV. MANY COMMENTERS AGREE THAT THIS PROPOSAL IMPOSES UNDUE BURDENS ON CONSTITUTIONALLY-PROTECTED COMMERCIAL SPEECH.

ANA stated in its initial comments that the Commission’s proposed broadband privacy rules unconstitutionally restrict commercial speech in violation of the First Amendment, in part because the NPRM violates the requirements for appropriate limitations on lawful, commercial speech.²⁵ There is no demonstrable substantial governmental interest shown by the Commission and therefore no direct and material advancement of that interest. Even if, for the sake of discussion, the validity of that interest were to be assumed, the proposed regulations are far more broad and extensive than necessary to serve such a purported interest.

ANA also pointed out that the NPRM’s significant encroachment on First Amendment rights will have substantial downstream effects on the speech interests of advertisers other than BIAS providers. Inappropriately burdening BIAS providers’ collection and use of data clearly will result in that data often not being available to other advertisers attempting to convey information to consumers. This would deny consumers access to that valuable information for purchasing and other decisions. There are multiple ways that the proposed rules are inconsistent

²⁵ See, for example, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

with commercial speech protections, and no comments persuasively set forth justification for the NPRM's speech incursions.

In fact, many comments reinforce ANA's concerns about the proposed rules' severe First Amendment encroachments. The renowned constitutional scholar Laurence Tribe, for example, analyzed the NPRM and commented that the NPRM "is a draconian approach to privacy," that it "imposes a substantial burden on speech," and that it "runs afoul of fundamental First Amendment limits on the Commission's authority to regulate customer information.... In particular, the proposed rules cannot meet the Supreme Court's ... test" for commercial speech regulation.²⁶

In addition, AT&T Services, Inc., stated that "[R]equiring opt-in consent would...merely burden the ability of ISPs and third parties to increase the relevance of the commercial messages they send to ISP customers. The Commission has neither articulated nor justified any valid governmental interest in imposing that burden and thereby tending to degrade the relevance of the commercial speech that ISPs and third parties can direct to particular customers."²⁷ AT&T Services, Inc.'s comments further underscored that the availability of an opt-out option for consumers "bars the government from suppressing truthful commercial speech through a one-size-fits-all opt-in requirement" in violation of the requirement to narrowly tailor commercial speech limitations.²⁸ Many other comments also demonstrated that the NPRM fails to meet the requirements for limitations on lawful, non-misleading commercial speech.²⁹

²⁶ "The Federal Communications Commission's Proposed Broadband Privacy Rules Would Violate the First Amendment," Comments of Laurence H. Tribe, as filed by CTIA, the National Cable and Telecommunications Association, and US Telecom Association, at pp. 1-2, <https://ecfsapi.fcc.gov/file/60002079394.pdf>

²⁷ Comments of AT&T Services, Inc., at p. 94, <https://ecfsapi.fcc.gov/file/60002080023.pdf>.

²⁸ *Id.* at p. 97.

²⁹ See e.g., Comments of Comcast Corporation, at pp. 89-99; Comments of the National Cable and Telecommunications Association, at p. 32; Comments of Verizon, at pp. 29-34; Comments of CenturyLink, at p. 12; Comments of CTIA, at pp. 78-94; and Comments of the Direct Marketing Association, at p. 18.

V. THE RECORD SHOWS THAT THE NPRM’S INFLEXIBLE, RAPID BREACH NOTICE REQUIREMENTS WOULD HARM CONSUMERS AND BUSINESSES WITHOUT OFFERING ANY COUNTERVAILING BENEFITS.

The record shows that numerous commenters strongly agree with ANA’s position that the proposed breach notification rules are inflexible, unreasonable, and detrimental to both consumers and businesses.³⁰ Many commenters echoed ANA’s concern that the NPRM’s overly broad proposed breach notice requirements, which cover intentional and unintentional breaches of both CPNI and customer proprietary information, would result in over-notification and consumer breach “notice fatigue.” Drawing on its decades of experience enforcing a wide range of laws to protect the privacy and security of consumer data, the FTC warned that “when consumers receive ‘a barrage of notices’ they could ‘become numb to such notices, so that they may fail to spot or mitigate the risks being communicated to them.’”³¹ The Internet Commerce Coalition expressed similar concerns, commenting that the NPRM’s proposed requirements “would cause ISPs to over-notify their customers and cause ‘notice fatigue’ that could cause consumers to ignore more serious breach notifications.”³²

Other commenters noted additional harms that would result from over-notification and inflexible notice periods. The State Privacy and Security Coalition pointed out that issuing frequent notices would be a “security distraction” for BIAS providers, and “[a]t worst, because security resources are usually finite, it would actually take resources away from the far more important task of protecting the resilience of broadband ISP critical infrastructure networks and

³⁰ See e.g., Comments of the United States Telecom Association, at p. 8; Comments of CTIA, as pp. 175-85; and Comments of the Internet Commerce Coalition, at pp. 14-15.

³¹ FTC Bureau of Consumer Protection Staff Comment, at p. 31 (quoting the FTC Health Breach Notification Rule, 74 Fed. Reg. at 42972).

³² Comments of the Internet Commerce Coalition, at p. 15.

network components.”³³ This inevitable result undermines the New America Foundation’s argument that the proposed rule would “drive [] covered entities to improve their data security practices so that they may avoid the reputational harm that results from a breach.”³⁴ In fact, to the contrary, it is likely to hurt the security of customer information, if consumers expect to receive breach notices as a matter of course.

AT&T Services, Inc., also shared ANA’s concern about the impact of the NPRM’s “unrealistic timeframe” for issuing breach notifications, commenting that BIAS providers “would often be unable to provide useful information or, in many cases, even identify the affected customers who need to be notified” in the proposed short notice window.³⁵ These proposals are totally inconsistent with the data security practices utilized by many states and will add substantial confusion and complexity to this area, while furthering no positive purpose.

Accordingly, the Commission should not adopt the proposed rigid and detrimental breach notification rules.

VI. THE NPRM IS STILL JURISDICTIONALLY AND LEGALLY SUSPECT DESPITE THE D.C. CIRCUIT’S OPINION ON THE UNDERLYING OPEN INTERNET ORDER.

The recent District of Columbia Circuit Court opinion upholding the Commission’s reclassification of BIAS as a telecommunications service does not put this NPRM on firmer legal ground.³⁶ That decision was focused on the Commission’s 2015 Open Internet Order, which contains only a brief discussion of Section 222 and does not even hint at the NPRM’s sweeping

³³ Comments of the State Privacy and Security Coalition, at p. 9.

³⁴ Comments of New America’s Open Technology Institute, at p. 30.

³⁵ Comments of AT&T Services, Inc., at p. 82.

³⁶ *U.S. Telecom Ass’n v. FCC*, No. 15-1063, Doc. # 1619173 (D.C. Cir. June 14, 2016).

and unreasonably broad opt-in consent framework.³⁷ Moreover, even if the Commission's authority to regulate BIAS is ultimately upheld by the courts (an outcome that is far from certain, as a number of entities have indicated they will file appeals of the decision), that would not allow the Commission to exercise its authority in contravention of constitutionally-protected rights and without a well-developed record demonstrating that the opt-in proposal would serve the public interest. ANA's filing and those of numerous others have amply demonstrated that this is certainly not the case.³⁸

VII. CONCLUSION.

The initial comments filed in this proceeding demonstrate that the Commission has not analyzed sufficiently the severe adverse impacts of the NPRM on consumer behavior, BIAS providers, other impacted advertisers, the Internet ecosystem, the U.S. economy, and First Amendment rights. A careful review of the record makes clear that the NPRM does not further the public interest and if promulgated would violate the Constitution. Therefore, the NPRM clearly should not be adopted.³⁹

³⁷ Report & Order on Remand, Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC No. 15-24, ¶ 467 (Mar. 12, 2015) ("Open Internet Order").

³⁸ See, e.g., *supra* Section III (discussing that self-regulation buttressed by FTC enforcement is working and the record does not reflect evidence to the contrary) and Section IV (discussing the Commission's constitutionally overbroad proposal and citing to the comments of AT&T Services, Inc., CTIA and USTA).

³⁹ See e.g., Comments of Verizon, at p. 29; *see also* Comments of the National Cable and Telecommunications Association, at pp. 6, 68, and ADTRAN at p. 15.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Dan Jaffe". The signature is fluid and cursive, with the first name "Dan" and last name "Jaffe" clearly distinguishable.

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